No. 09-419

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2009

COMMONWEALTH OF KENTUCKY,
Petitioner

vs.

EDDIE CARDINE AND MICHAEL CURRY
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT MICHAEL CURRY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Michael Curry believes the question presented by petitioner's Petition for a Writ of Certiorari is essentially one of state law Whether the Double Jeopardy Clause of the United States Constitution prohibits a State appellate court from Adopting a State Procedural Policy Dispensing with Its Contemporaneous Objection Rule for Claims of Double Jeopardy Raised for the First Time in a State Appeal from a Conviction in a State Trial Court?

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STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner claims to be basing this Court's jurisdiction upon 28 U S C §1257(a) This Court does not have jurisdiction under that statute because petitioner's petition does not state a violation of "any title, right, privilege, or immunity under the Constitution of the United States"

STATEMENT OF THE CASE

A. **Preliminary Statement:**

In its "Question Presented," the Commonwealth of Kentucky concedes that there was no manifest necessity for aborting the original trial of Michael Curry and Eddie Cardine Part of the proposition, as stated by the Commonwealth in its question, is that "the trial court *sua sponte* declares a mistrial absent manifest necessity" In other words, the State does not contest the validity of the Supreme Court of Kentucky's holding that the second trial violated double jeopardy protections It contests the authority of the court to address the merits of the issue

The decision of the Supreme Court of Kentucky to address this issue rests, at least in part, on an adequate and independent state law ground For over 30 years the Supreme Court of Kentucky has adhered to a state procedural policy that it will address double jeopardy issues raised on appeal even if they are not raised or are improperly raised in the court below Sherley v Commonwealth, 558 S W 2d 615, 618 (Ky 1977), *overruled on other grounds by* Dixon v Commonwealth, 263

S W 3d 583 (Ky 2008) This waiver of the State's contemporaneous objection rule, KY R CRIM P 9 22, applies to all double jeopardy issues, not just unsolicited declarations of a mistrial *See* Beaty v Commonwealth, 125 S W 3d 196, 210 (Ky 2003) (convictions for both manufacturing a controlled substance and possession of controlled substance manufactured violate double jeopardy), Butts v Commonwealth, 953 S W 2d 943, 945 (Ky 1997) (Whether convictions under two different statutes for same course of conduct violates double jeopardy)

Essentially, the State is asking this Court to declare this long-standing state procedural policy unconstitutional under the Double Jeopardy Clause of the United States Constitution

B. The Trial Court Proceedings:

The disagreements Respondent Curry has with petitioner's Statement of the Case are mostly minor Petitioner claims that defense counsel interviewed Hebert, while the record shows that counsel for all parties participated in the interview of Hebert Petitioner claims that Hebert was sworn to reappear after the interview, while the record shows that Hebert was sworn to reappear prior to the interview

Petitioner fails to adequately express that Michael Curry and Eddie Cardine made it clear to the trial judge the relief they wanted was the exclusion of Hebert's testimony When he first learned of Hebert's testimony Michael Curry's attorney told the court, "I would ask that [Hebert's testimony] would be excluded, and not

be allowed to, discussed at openings [statements]" (VR 05-1, 10/26/05, 10 49 24) A short time later he said, "I'm not asking for a continuance, I'm asking for exclusion" (VR 05-1, 10/26/05, 10 55 57) Following lunch, and after discussions between the court and parties that were not on the record, Curry's defense counsel said, "I'm going to move to exclude him [Hebert], I don't think you're going to do that" (VR 05-1, 10/26/05, 13 22 55) This was not a case where the defendants were tacitly seeking a mistrial They wanted Hebert's testimony excluded from the trial that had already been begun

Respondent Curry also disagrees with what he considers the false impression given concerning the amount of time that elapsed between the trial court's *sua sponte* declaration of a mistrial and when the proceedings ended In fact, barely three minutes elapsed between the time of the mistrial declaration and when the video recording of the proceedings ended (VR 05-1, 10/26/05, 14 46 10-14 49 40)

C. **Direct Appeal to the Supreme Court of Kentucky:**

Respondent Michael Curry did not raise the double jeopardy issue in his appeal to the Supreme Court of Kentucky Respondent Cardine did raise that issue in his brief to the Supreme Court of Kentucky When Cardine raised the issue, Petitioner Commonwealth of Kentucky did not argue that Cardine's failure to object after the trial court's *sua sponte* declaration of a mistrial barred the Supreme

Court of Kentucky from addressing the merits of Cardine's double jeopardy claim Instead, the Commonwealth argued a) that the trial court's *sua sponte* declaration of a mistrial was not an abuse of discretion, b) the claim was unpreserved for appeal, and c) the claim was waived by Cardine's request for a continuance before the trial court declared a mistrial

The Commonwealth's argument to the Supreme Court of Kentucky, which is brief, is reproduced here in its entirety

> THE JEFFERSON CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN FINDING A MANIFEST NECESSITY AND DECLARING A MISTRIAL WHEN APPELLANT REQUESTED A CONTINUANCE TO A NEW TRIAL DATE IN LIEU OF A SHORT CONTINUANCE OF THE PENDING TRIAL
>
> Appellant's first argument is that it was a violation of the proscriptions against double jeopardy when he was retried after his first trial was declared a mistrial In his argument appellant fails to note that the trial court declared the mistrial after appellant argued that he would be prejudiced by the disclosure of a new witness immediately prior to the commencement of proof, that a short continuance would not cure the prejudice and only exclusion or in the alternative continuance to a new trial date would be proper (See Tape 2 10/26/05 14 40 15--14 41 30) The court then only granted appellant what he asked for and it was ***not an abuse of discretion*** to find a manifest necessity and declare a mistrial when the court did not have a certain date for the new trial ***The claim is otherwise unpreserved and waived by the request for a new trial date.***

Double jeopardy furthermore does not bar retrial if the proceedings were terminated because the trial court found a manifest necessity Commonwealth v Scott, 12 S W 3d 682 (Ky 2000) The declaration of a mistrial is vested to the sound discretion of the trial court See Neal v Commonwealth, 95 S W 3d 843 (Ky 2003) And the limit upon the exercise of that discretion must take into consideration that the trial court is best situated to evaluate the issue at hand Wiley v Commonwealth, 575 S W 2d 166 (Ky 1978)

Herein the trial court carefully considered the importance of the new witness to both the prosecution and defense Appellant sought exclusion or a new trial date The Commonwealth indicated a need for the evidence coming from an unbiased third party but did not object to a continuance

There though was no reason to exclude the witness from testifying as there was no discovery violation and the fact that Curry possessed a firearm earlier in the day is not a prior bad act under KRE 404 But regardless notice was given immediately to opposing counsel and accordingly even if there was not disclosure under the rule the court was allowed to fashion an appropriate remedy KRE 404(c)

The new trial date was an otherwise appropriate remedy (as it was requested by the appellant) and there was no objection to the declaration of a mistrial by either Cardine or Curry Curry, in fact, does not even raise the claim of error and notes only the declaration was a necessity due to the impact the prosecution's late discovery of the witness had on the defendants's (sic) defenses (See Brief for Appellant in 2006-SC-680 at p 5)

Certainly there was grounds for finding a manifest necessity as the court with the first possible trial date being over two months away and no trial date certain did

> not have any reason to know when it could retry the case with the present jury if at all And as discussions with counsel after the declaration indicated their (sic) was good reason for uncertainty as both the court and counsel had significant cases already on there (sic) calendar through two-four months later Reversal now is otherwise unwarranted

Brief for Commonwealth, 2006-SC-677, 6-8 (2008 WL 6013722 at 5) (emphasis added)

As can be seen from the above quote, petitioner did not argue that the Supreme Court of Kentucky was barred from deciding the Double Jeopardy issue raised by Cardine Petitioner did not argue that Cardine's failure to object to the trial court's *sua sponte* declaration of a mistrial after it occurred constituted an implied consent to the mistrial The primary position of the Commonwealth was that it was not an abuse of the trial court's discretion to find that a manifest necessity existed for the declaration of a mistrial The fallback positions of the Commonwealth were that the issue was not preserved for appeal and that it was waived by Cardine's request for a continuance [1]

The Supreme Court of Kentucky disagreed with the Commonwealth's analysis That Court found there was no manifest necessity for declaration of the mistrial, a finding the Commonwealth of Kentucky does not challenge in its Petition for a Writ of Certiorari In fact, the Commonwealth specifically concedes

there was no manifest necessity for the mistrial in the "Question Presented" section of its Petition for a Writ of Certiorari Therefore, the Supreme Court of Kentucky's holding regarding the existence of a manifest necessity for the mistrial will not be discussed in detail

The Supreme Court of Kentucky also addressed petitioner's claims that the issue was not preserved for appeal and that it was waived by the request for a continuance in Section C of its opinion The Court gave three independent reasons for denying this portion of petitioner's argument on appeal First, the Kentucky Supreme Court found that the issue was not waived because neither Cardine nor Curry asked the trial court for a mistrial The court found, and its finding is supported by the record, that respondents asked for either exclusion of the new witness or a continuance Second, citing Radford v Lovelace, 212 S W 3d 72 (Ky 2006) and United States v Gantley, 172 F 3d 422 (6th Cir 1999), the court held that Cardine and Curry were not required to object to the mistrial Third, the Kentucky Supreme Court held that a double jeopardy violation is a palpable error that can be addressed under the State's plain error, or "substantial error," rule KY R CRIM P 10 26

D. The Commonwealth's Petition for Rehearing:

[1] The Commonwealth's brief uses the term "request for a new trial date," but the Supreme Court of Kentucky found this to be a request for a continuance under Kentucky procedural law and that finding is supported by the quotations attributed to trial defense counsel in petitioner's Petition for a Writ of Certiorari

The Commonwealth raised two issues in its Petition for Rehearing First, the Commonwealth argued the Supreme Court of Kentucky had overlooked material facts in deciding there was no manifest necessity for the declaration of a mistrial As stated before, the Commonwealth does not challenge the Supreme Court of Kentucky's finding there was no manifest necessity for a mistrial in this petition for a writ of certiorari The second argument made by the Commonwealth in its petition for rehearing was that the Supreme Court of Kentucky had incorrectly extended its opinion in Radford v Lovelace, 212 S W 3d 72 (Ky 2006), which held that a contemporaneous objection is not required when there is no opportunity to object, to a situation where the Commonwealth felt there was an opportunity for an objection, albeit after the trial court had issued its ruling declaring a mistrial The Commonwealth did not challenge in its Petition for Rehearing the procedural policy of the Supreme Court of Kentucky of addressing double jeopardy issues on appeal even though not raised or improperly raised in the court below because it considers those types of errors to meet its definition of a "palpable error "

The Supreme Court of Kentucky did not issue a separate opinion to address the reasons it denied the Commonwealth's petition for rehearing However, KY R CIV P 76 32(1)(b) provides, "Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued

on the appeal " To the extent the Commonwealth's argument in its petition for rehearing could be construed as presenting the same argument it makes in its Petition for a Writ of Certiorari, the Supreme Court of Kentucky was entitled to disregard the issue because it was made for the first time in the Petition for Rehearing

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED IN THE PETITION FOR A WRIT OF CERTIORARI WAS NOT PROPERLY PRESENTED TO THE SUPREME COURT OF KENTUCKY.

In its petition for a writ of certiorari the Commonwealth of Kentucky claims, "The Commonwealth responded[2] that the defendant had consented to the court's *sua sponte* order by his actions both before ***and after*** the judge announced her intent to declare a mistrial " Petition for a Writ of Certiorari at 4 (emphasis added) That claim is not accurate Respondent, in his statement of the case, quoted the Commonwealth's argument from its brief in Cardine's case in full The only mention of the discussions held after the trial court declared a mistrial in the Commonwealth's argument was a reference to the fact that the next available trial date was some time away ("And as discussions with counsel after the declaration

[2] The Commonwealth claims its response was to Cardine's argument that the second trial had violated his double jeopardy rights under the Fifth and Fourteenth Amendments to the United States Constitution

indicated their (sic) was good reason for uncertainty as both the court and counsel had significant cases already on there (sic) calendar through two-four months later ") That mention was intended to show that there was a manifest necessity for the declaration of the mistrial, not the argument the Commonwealth now claims it supports In the brief it filed before the Supreme Court of Kentucky the Commonwealth never claimed that Cardine's failure to object to the mistrial *after* it was declared constituted a waiver or consent to the declaration of the mistrial The Commonwealth's claim of waiver was based on Curry's and Cardine's requests for a continuance before the mistrial was declared The Supreme Court of Kentucky made a finding of fact that those requests were not the same as a motion for a mistrial The Commonwealth has not contested that finding Instead it has shifted its argument to something that was not properly presented to the Supreme Court of Kentucky

Likewise, the Commonwealth now claims, "The Commonwealth had argued that the defendants' failure to object, both before and after the lower court announced its intention to declare a mistrial, was proof of the defendants' consent thereto " Petition for a Writ of Certiorari at 5 The claim is not accurate That argument was made, at best, in the Petition for Rehearing Under Kentucky procedural law, an argument made for the first time in a petition for rehearing is not timely Herrick v Wills, 333 S W 2d 275, 276 (Ky 1960) ("Errors not called

to the attention of the appellate court prior to the time a decision is rendered may be deemed waived Except for most extraordinary cause, we will not consider an issue on appeal raised for the first time in a petition for rehearing For the foregoing reason, the petition for rehearing is overruled "), Reed v Reed, 457 S W 2d 4, 7 n 1 (Ky 1969), KY R CIV P 76 32(1)(b)

The Commonwealth now makes the failure to object to a mistrial in the interval between the declaration of the mistrial and the actual dismissal of the jury the focus of its allegation of implied waiver It says, "At issue in this case is whether a defendant consents to a mistrial by failing to object ***after*** the trial court *sua sponte* declares one " Petition for a Writ of Certiorari at 7 (emphasis added) The Commonwealth argues, "Certainly there was ample time for the defense to express its position on mistrial The parties were in the courtroom for several minutes ***after*** the court declared the mistrial " Petition for a Writ of Certiorari at 13 (emphasis added) The issue the Commonwealth is asking this Court to grant certiorari upon was never presented by the Commonwealth in the appellate briefs it filed with the Supreme Court of Kentucky

The Supreme Court does not normally decide questions that are neither raised nor resolved below Glover v United States, 531 U S 198, 205 (2001) This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below " Peralta v Heights Med

Center, Inc., 485 U.S. 80, 86 (1988). *See* Campbell v. Louisiana, 523 U.S. 392, 403 (1998) ("'With "very rare exceptions," we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" (quoting Adams v. Robertson, 520 U.S. 83, 86 (1997) (per curiam)). In Adams, this Court said, "[T]he aggrieved party bears the burden of demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" Id., 520 U.S. at 87.

This Court should not grant certiorari to decide an issue that was never fairly presented to the Supreme Court of Kentucky for decision in the first instance.

II.

THE SUPREME COURT OF KENTUCKY'S OPINION IS BASED UPON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

The Supreme Court of Kentucky gave three reasons for denying the Commonwealth's "otherwise unpreserved and waived" argument from its appellate brief. The third reason is a completely independent and adequate state law reason for denying the Commonwealth's argument. Respondent will quote that entire section, it is not overly long, so this Court can see it is an independent state law ground for denying the Commonwealth's argument.

> Third, even though neither Appellant raised the issue of double jeopardy at the time of their retrial, as noted

> above double jeopardy violations can be addressed as palpable error[3] because the nature of such errors is to create manifest injustice Presentation of such errors to the trial court, while perhaps preferable, is not required In Sherley v Commonwealth, 558 S W 2d 615, 618 (Ky 1977), *overruled on other grounds by* Dixon v Commonwealth, 263 S W 3d 583 (Ky 2008), this Court heard a double jeopardy claim even though it was not raised at trial Even though the defendant "did not present th[e] issue of double jeopardy or multiple prosecution to the trial court [this Court was] persuaded that failure to preserve this issue for appellate review should not result in permitting a double jeopardy conviction to stand" Id This principle has been repeatedly affirmed "[U]nder ***our longstanding rule***, double jeopardy questions may be reviewed on appeal, even if they were not presented to the trial court" Terry [v. Commonwealth], 253 S W 3d [466 (Ky 2007)] at 470, Beaty v Commonwealth, 125 S W 3d 196, 210 (Ky 2003), Grundy v Commonwealth, 25 S W 3d 76, 85 (Ky 2000), Butts v Commonwealth, 953 S W 2d 943, 945 (Ky 1997), Gunter v Commonwealth, 576 S W 2d 518, 522 (Ky 1978), *see also* Menna v New York, 423 U S 61, 62, 96 S Ct 241, 46 L Ed 2d 195 (1975) (double jeopardy claim on appeal not waived by defendant's guilty plea) This Court "remain[s] committed to ***our procedural holding*** in Sherley that failure to preserve double jeopardy issues 'should not result in permitting a double jeopardy conviction to stand' " Dixon, 263 S W 3d at 593 n 50, (quoting Sherley, 558 S W 2d at 618)

Cardine v Commonwealth, 283 S W 3d 641, 652-653 (Ky 2009) (emphasis added) This basis for denying the Commonwealth's argument was strictly a state

[3] Kentucky's palpable or plain error rule, KY R CRIM P 10 26, states, "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error"

issue The Supreme Court of Kentucky refers to "our longstanding rule" and "our procedural holding " It refers to "palpable error " The cases it cites are all state cases from Kentucky, with one exception, Menna v New York When citing Menna, the Kentucky Supreme Court used the "see also" signal, indicating it was cited as an additional source material that supported the proposition

The Kentucky courts realize this is a state court rule It reflects the value the Kentucky courts place on the individual's right to be free from the governmental overreaching that the Double Jeopardy Clause was intended to protect against The Kentucky Supreme Court plainly adopted this as an independent state rule in Baker v Commonwealth, 922 S W 2d 371 (Ky 1996) (*overruled on other grounds by* Dixon v Commonwealth, supra), where it said

> At the outset we must observe that appellant's double jeopardy claim is unpreserved Appellant made no double jeopardy objection whatsoever nor did she tender instructions She did object to the instructions which were given on grounds that they contained overlapping mental states Nevertheless, we have held in Sherley v Commonwealth, Ky , 558 S W 2d 615, 618 (1977), and Gunter v Commonwealth, Ky , 576 S W 2d 518, 522 (1978), that failure to object on grounds of double jeopardy does not constitute a waiver of the right to raise the issue for the first time on appeal This view appears to be based on Menna v New York, 423 U S 61, 96 S Ct 241, 46 L Ed 2d 195 (1975), a per curiam opinion which held that a plea of guilty after an unsuccessful plea of double jeopardy would not constitute waiver, that the merits of the double jeopardy claim should be reviewed on appeal Menna, 423 U S at 62, 96 S Ct at 242 From Menna to Sherley and Gunter is a significant leap of

> logic and we now question its soundness A principal reason for doubting the soundness of the rule, in addition to the general reasons for requiring preservation, is the difficulty of analyzing a double jeopardy claim when there is no context from the trial court In such a circumstance, an appellate court must decide from the entire record whether double jeopardy principles have been violated on any one of multiple bases As such, appellant's counsel is at liberty to throw every possible double jeopardy theory at the Court without having had to analyze and present such claims in the trial court Deciding issues in such a manner is fraught with danger of error or omission and we can think of no compelling reason for such deference to double jeopardy principles As with other rights, constitutional rights may be waived by failure to timely and properly present the issue West v Commonwealth, Ky , 780 S W 2d 600, 602 (1989) ***Nevertheless, we will observe the Sherley rule in this case and address the merits of appellant's double jeopardy claim.***

Id , 922 S W 2d at 374 (emphasis added)

The "Sherley rule," as the Kentucky Supreme Court referred to it in Baker, is, in essence, a waiver of the Commonwealth's contemporaneous objection rule for double jeopardy issues The Supreme Court of Kentucky recently referred to this as a an exception to the usual rules of preservation in Brooks v Commonwealth, 217 S W 3d 219, 221-222 (Ky 2007), "[D]ouble jeopardy violations are treated as an exception to the general rules of preservation [A] double jeopardy violation may be reviewed on appeal regardless of a failure to raise it in the trial court "

This Court has held in the past that a State's contemporaneous objection rule

is an independent state rule that is entitled to deference Engle v Isaac, 456 U S 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights "), Wainwright v Sykes, 433 U S 72, 81 (1977) ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts ") For the same reasons, a State's waiver of its contemporaneous objection rule should be honored by the federal courts

Further, "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment *See*, e g , Fox Film Corp v Muller, 296 U S 207, 210 (1935) " Coleman v Thompson, 501 U S 722, 729 (1991) "[A]n adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment " Dretke v Haley, 541 U S 386, 392 (2004), *see*, e g , Murdock v Memphis, 20 Wall (87 U S) 590 (1874), Loftus v Illinois, 334 U S 804, 805 (1948), *cf* Adams v Robertson, supra The decision of the Supreme Court of Kentucky rests upon an adequate and independent state law ground

In it's Petition for Rehearing before the Supreme Court of Kentucky and in its Petition for a Writ of Certiorari before this Court petitioner makes dramatic

claims that the holding of the Supreme Court of Kentucky will lead to gamesmanship and sandbagging However, 33 years have elapsed since Sherley v Commonwealth, supra The Kentucky courts have reviewed unpreserved double jeopardy violations during that entire period of time The Supreme Court of Kentucky has obviously not observed the gamesmanship that petitioner has predicted would occur

Petitioner proposes that a defendant should be required to continue to argue and object, after a judicial ruling has been made, until the jury is finally discharged "[A] defendant has the opportunity to object until the jury is discharged, and his failure to do so constitutes consent" Petition for a Writ of Certiorari at 7 That rule would be disrespectful to the rulings of the trial court and would have negative consequences for courtroom decorum Parties would never know when they had objected enough Parties could never stop objecting for fear of being accused of consenting to a mistrial The Supreme Court of Kentucky rightly held that a party is not required to lodge further objection or make further argument after the trial court has made a ruling The Supreme Court of Kentucky's decision is reasonable

The Supreme Court of Kentucky has policy-making and administrative authority over the Kentucky Court of Justice KY R SUP CT 1 010 It is within the Kentucky Supreme Court's policy-making authority to decide whether the risk

of sandbagging defendants who fail to preserve double jeopardy issues is outweighed by the risk of lost decorum or any other value that court might see in allowing the waiver of its contemporaneous objection rule It is also within the Kentucky Supreme Court's policy-making authority to decide whether double jeopardy violations constitute palpable error under its procedural rules The Supreme Court of Kentucky has over 30 years of experience with the "Sherley rule" Its decision that double jeopardy violations qualify as palpable error under KY R CRIM P 10 26 is entitled to deference from this Court

CONCLUSION

The Petition for Writ of Certiorari should be denied

Respectfully submitted,

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